



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

February 24, 2015 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-196

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council ("Council") considered the February 17, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian's Counsel has failed to establish in his request for reconsideration of the Council's April 29, 2014 Interim order that, either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on mistake and illegality. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, Counsel failed to argue successfully that the Millstone Valley Fire Department was not a public agency in accordance with current "public agency" case law. Thus, Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council's April 29, 2014 Interim Order remains in effect and the Custodian must comply with same.

Interim Order Rendered by the
Government Records Council
On The 24th Day of February, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 25, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-196

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail or fax of the Constitution and By-Laws for Millstone Valley Fire Department (“MVFD”) in effect from 2007 through 2013.

Custodian of Record: Tim Szymborski

Request Received by Custodian: February 28, 2013

Response Made by Custodian: March 1, 2013

GRC Complaint Received: July 3, 2013

Background

April 29, 2014 Council Meeting:

At its April 29, 2014 public meeting, the Council considered the April 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because Millstone Valley Fire Department is a member of the Franklin Fire District No. 1 per N.J.S.A. 40A:14-70.1 and thus serves a governmental function under the supervision and control of the Franklin Fire District No. 1, it is a public agency for purposes of OPRA. Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).
2. As the Council has determined that Millstone Valley Fire Department is a public agency for purposes of OPRA, and in the absence of any exemption applying to the responsive records, the Custodian is required to obtain same from Millstone Valley Fire Department and provide access to the Complainant. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006). If the Custodian cannot comply

¹ Represented by John A. Birmingham, Jr., Esq. (Mount Bethel, PA) and Walter M. Luers, Esq., of the Offices of Walter M. Luers (Clinton, NJ). Mr. Luers entered his appearance on May 27, 2014.

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

with the Council's Order because individuals at Millstone Valley Fire Department will not disclose same, those individuals are required to identify themselves to the GRC and provide a lawful basis for not providing said records.

3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 1, 2014, the Council distributed its Interim Order to all parties. On May 6, 2014, the Custodian's Counsel requested additional time to comply with the Council's Order pending submission of a request for reconsideration. On May 7, 2014, the GRC granted the Custodian Counsel's request for an extension until May 15, 2014.

On May 14, 2014, the Custodian's Counsel filed a request for reconsideration of the Council's April 29, 2014 Interim Order based on a mistake and illegality. The Custodian's Counsel contended that, in determining that MVFD was a "public agency" for purposes of OPRA, the Council incorrectly applied precedential "public agency" case law. The Custodian's Counsel asserted that MVFD and all other member companies and departments of Franklin Fire District No. 1 ("FFD") are essentially subcontractors providing a service under an annual contract.

The Custodian's Counsel stated that, for background information, fire districts are governed by N.J.S.A. 40A:14-70 *et seq.* The Custodian's Counsel averred that there is no dispute that fire districts are "public agencies" for purposes of OPRA; however, a fire district can either establish its own volunteer fire companies or contract its governmental function of extinguishing fires to volunteer companies. The Custodian's Counsel further contended that member companies are very similar to their non-member counterparts. Specifically, they are non-profits, but members are under the supervision of the contracting body.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

The Custodian's Counsel first noted that determining whether an entity is a "public agency" for purposes of OPRA involves a fact-specific inquiry. Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278, 288 (App. Div. 2013).

The Custodian's Counsel argued that the Council improperly applied the creation test and that the facts here closely mirrored the facts in Carrow v. Borough of Newfield (Gloucester), GRC Complaint No. 2012-111 (February 2013). The Custodian's Counsel stated that in Carrow, the Council looked to Fair Share Hous. Ctr., Inc. v. NJ State League of Municipalities, 207 N.J. 489 (2011) in determining that the Newfield Fire Company ("NFC") was not a "public agency" for purposes of OPRA because it did not meet the creation test. The Custodian's Counsel noted that relevant factors included that the company was created by the members and the Borough did not control day-to-day operations. The Custodian's Counsel argued that an application of the creation test on MVFD, as applied in Carrow, would have yielded that the MVFD is not a "public agency" for purposes of OPRA.

Regarding MVFD's creation, the Custodian's Counsel stated that same was started 20 years prior to the creation of the FFD. The Custodian's Counsel argued that for this reason, it is not appropriate to utilize N.J.S.A. 40A:14-70.1(a) to analyze MVFD's relationship with the FFD; rather, N.J.S.A. 40A:14-70.1(b) controls. The Custodian's Counsel averred that MVFD did not desire to create a volunteer company within a district. However, MVFD became encompassed within the FFD when it expanded its borders in 1973. *See* Minutes of the Township of Franklin dated October 25 1973; minutes of the FFD dated March 26, 1973. The Custodian's Counsel thus argued that MVFD was never created within the FFD and never submitted an application or petition as part of its merger with the FFD. The Custodian's Counsel contended that the GRC should have applied the creation test here because the relationship between MVFD and the FFD is similar to the relationship between NFC and the Township of Newfield in Carrow.

Moreover, the Custodian's Counsel argued that the FFD has no control over MVFD's day-to-day operations. The Custodian's Counsel noted that the New Jersey Association of Fire Districts provides member districts with a handbook to assist them with laws governing the operation same within New Jersey. Counsel asserted that this handbook includes a sample agreement or contract recommended for use when contracting with fire departments or companies. The Custodian's Counsel further noted that the contract is consistent with the authority provided in N.J.S.A. 40A:14-70.1(b) and also mirrors the relevant statute the GRC relied on in Carrow, GRC 2012-111; N.J.S.A. 40A:14-68. The Custodian's Counsel directed the GRC to ¶ 9, of the most recent contract with MVFD, which provides that the FFD will not interfere or seek to regulate MVFD's internal administration.

Further, the Custodian's Counsel disputed that MVFD was "under the supervision and control" of the FFD. Counsel asserted that N.J.S.A. 40A:14-68(a) and N.J.S.A. 40A:14-70.1(b) control here, as in Carrow, and that only the members are under the supervision and control of the FFD. The Custodian's Counsel argued that this is no different than the control exercised by a municipality contracting with a volunteer fire company.

In closing, the Custodian's Counsel contended that the GRC arbitrarily relied on the Appellate Division's decision in Szabo v. NJ State Firemen's Ass'n, 230 N.J. Super. 265 (Ch.

Div. 1988) and Paff, 431 N.J. Super. 278. The Custodian's Counsel asserted that the GRC appeared to have reached its decision by relying on the Court's ruling that the Firemen's Association received tax money and serves numerous government functions. The Custodian's Counsel asserted that this argument is flawed because the GRC failed to analyze the issue under the creation test as it did with NFC in Carrow. The Custodian's Counsel reiterated that there is no difference in relationships between the entities in either complaint. The Custodian's Counsel noted that there is no dispute that the FFD is subject to OPRA, but because it has no day-to-day control over MVFD's administration and affairs, an OPRA request for its constitution and bylaws is inapposite to that relationship.

Additional Submissions

On May 27, 2014, the Complainant's Counsel requested an extension until June 12, 2014 to submit objections to the Custodian Counsel's request for reconsideration, which the GRC granted.

On June 5, 2014, Mr. Aldo J. Russo, Esq., of Lamb, Kretzer, LLC, submitted a letter brief on behalf of MVFD. Therein Mr. Russo expressed MVFD's support for the Custodian Counsel's request for reconsideration.

Mr. Russo stated that MVFD, like many volunteer fire companies, serves a dual purpose of a fire company and social organization for the benefit of membership association. Mr. Russo stated that neither those individuals composing the membership nor the social organization are substantially funded by government; no social functions use taxpayer money. Mr. Russo asserted that, to this end, records of the MVFD might contain "firematics" issues and social organization/activities issues alike. Mr. Russo asserted that it does not support a decision requiring disclosure of any records under OPRA. However, should the GRC not grant reconsideration in this complaint, Mr. Russo requested that the GRC allow for redaction of any information contained in records provided to the Complainant that is deemed to be social. Mr. Russo further stated that, should the GRC permit such redactions, MVFD will submit records to the GRC for a determination.

Additionally, Mr. Russo asserted that if MVFD is determined to be a "public agency" for purposes of OPRA, then it should have been provided with a copy of the OPRA request. However, the Complainant submitted his OPRA request to the FFD; thus, the MVFD was not given the opportunity to be heard prior to the Council's decision. Mr. Russo contended that the Council's Interim Order, based on the circumstances of this complaint, represent a fundamental denial of due process rights of MVFD to oppose the OPRA request.

On June 12, 2014, the Complainant's Counsel sought an extension until June 13, 2014, to submit objections based on extenuating circumstances, which the GRC granted.

Objections:

On June 13, 2014, the Complainant's Counsel submitted objections to the request for reconsideration. First, the Complainant's Counsel contended that the Custodian's Counsel

presented no new evidence or law. The Complainant's Counsel asserted that the GRC's decision is not palpably incorrect or arbitrary, considering that the Custodian's Counsel admitted in his request for reconsideration that MVFD was under the "supervision and control" of FFD. The Complainant's Counsel further asserted that the Legislature has statutorily delineated the responsibilities of fire districts and municipalities in N.J.S.A. 40A:14-70 *et seq.* The Complainant's Counsel contended that the GRC's decision was correct based on this factual distinction.

The Complainant's Counsel disputed Custodian Counsel's argument that this complaint is similar to Carrow, GRC 2012-211. First, the NFC was in a municipality and not a fire district. The Complainant's Counsel asserted that the FFD is an independent governmental instrumentality specifically created under N.J.S.A. 40A:14-70 and is entirely different from municipalities with no fire districts.

Second, the Complainant's Counsel argued that Carrow was decided prior to binding precedent in Paff, 431 N.J. Super. 278. The Complainant's Counsel asserted that the importance of this timing cannot be understated. The Complainant's Counsel noted that cases involving a question of whether non-profits are public agencies can be difficult. The Complainant notes that, in two examples, the Courts have held differently even where some facts could be similar. *See Times of Trenton v. Lafayette Yard*, 183 N.J. 519 (2005); *Sussex Commons Ass'n, LLC v. Rutgers, the State Univ.*, 210 N.J. 531 (2012). The Complainant's Counsel suggested that, as opposed to using labels like "governmental function test," "creation test," or "creation and control test," the analysis in Paff can best describe the issues as whether an agency's "formation, structure and function render it a public agency under OPRA." *Id.* at 289-90.

The Complainant's Counsel stated that fire companies cannot exist in a fire district without specific authorization of that district. N.J.S.A. 40A:14-70(a). *See also* N.J.S.A. 40A:14-81.3. Further, the Complainant's Counsel stated that the statute clearly provides that such companies are "under the control and supervision" of the district. N.J.S.A. 40A:14-70(b). *See also* N.J.S.A. 40A:14-81.3. The Complainant's Counsel argued that here, if the FFD is a public agency, any subordinate political subdivision authorized to exist within the FFD is a public agency for purposes of OPRA. The Complainant's Counsel also noted that the Custodian's Counsel provided no evidence to suggest that a volunteer fire company operating in a municipality without a fire district is a subordinate of same. Further, the Complainant's Counsel noted that the Custodian's Counsel provided no evidence to support that MVFD is funded with monies other than from fire taxes paid by the FFD.

In sum, the Complainant's Counsel asserted that, in applying the principles of Paff, the GRC correctly determined that MVFD is a "public agency" under OPRA. Specifically, MVFD cannot operate within the FFD without resolution authorization and is funded by the public through the FFD. Further, the Complainant's Counsel asserted that MVFD is under the FFD's day-to-day control by virtue of its existence within the FFD as a volunteer fire company.

Moreover, the Complainant's Counsel asserted that expansion of the FFD boundaries is also critical but for reasons inapposite to the FFD's reconsideration arguments. Specifically, MVFD was created and operated independently prior to this expansion; it became a political

subdivision the moment it gained authorization from the FFD to operate within the FFD's newly expanded boundaries. Further, the Complainant's Counsel noted that although Franklin Township has authority to expand or abolish the FFD per N.J.S.A. 40A:14-94, it does not have authority over the management of same, which rests with the Commissioners. N.J.S.A. 40A:14-70.1(a); N.J.S.A. 40A:14-81. The Complainant's Counsel asserted that because those Commissioners approved, by resolution, MVFD to operate within their boundaries, the plain language of N.J.S.A. 40A:14-70.1(a) unambiguously renders the FFD's arguments moot: MVFD is a "public agency" by virtue of the FFD's approval by resolution.

The Complainant's Counsel also addressed Mr. Russo's letter brief, first asserting that same was beyond the time period to submit reconsideration and should be considered time-barred. Second, the Complainant's Counsel contended that OPRA contains no exemptions for "social organizations." The Complainant's Counsel asserted that if MVFD expends taxpayer money as a "social organization," then those expenses should be subject to OPRA. Third, the Complainant's Counsel noted that MVFD was involved in responding to the Complainant's OPRA request and cannot now claim surprise. Finally, the Complainant's Counsel noted that MVFD did not cite to nor distinguish this complaint from Sauter v. Twp. of Colt's Neck, GRC Complaint No. 2005-07 (March 2006)(holding that the Colt's Neck Fire Department was a "public agency" because it was created through municipal code).

Additional Submissions:

On January 24, 2015, the Complainant's Counsel e-mailed the GRC submitting the Appellate Division's decision in Newfield Fire Co. No. 1 v. Borough of Newfield, ___ N.J. Super. ___ (App. Div. 2015). The Complainant's Counsel asserted that Newfield, supports the GRC's decision in this matter.⁵

On February 11, 2015, the Complainant's Counsel e-mailed the GRC submitting the Law Division's decision in Stern v. Lakewood Volunteer Fire Dep't, et al., 2015 N.J. Super. Unpub. LEXIS 255 (February 6, 2015). The Complainant's Counsel asserted that, although unpublished cases are not binding, the legal analysis in Stern, is consistent with the Council's decision in this matter.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

⁵ The GRC notes that the Appellate Division's decision centered on whether the municipality has the authority to involve itself in the Fire Company's day-to-day operations by ordinance.

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's April 29, 2014 on May 14, 2014, nine (9) days from the issuance of the Council's Order.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The GRC has reviewed all arguments presented and is satisfied that its initial decision is grounded in the most current "public agency" case law available. Specifically, the Custodian's Counsel's arguments revolve on case law available at the time of Carrow, GRC 2012-111 and ignore the Appellate Division's use of both the government function and creation test in Paff, 431 N.J. Super. 278. Further, the facts in Paff provide a perfect of example of how an agency not initially created by government can become a "public agency" over time.

The GRC also remains unpersuaded that non-district volunteer fire companies and district volunteer companies are similar. A review of the contract provided by the Custodian's Counsel reveals that the FFD exhibits a broader amount of control over MVFD's operations than was the case in Carrow. Specifically, the MVFD is required to adhere to FFD standards, must maintain their building and equipment in accordance with the contract, provide a polling location for elections, submit budgets, and participate in FFD meetings. While there is a caveat that the FFD would not regulate internal administration of the MVFD, there exists a fair amount of contractual control inapposite to the facts in Carrow.

As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. Counsel failed to establish that the complaint should be reconsidered based on mistake and illegality. Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, Counsel failed to successfully argue that the MVFD was not

a public agency in accordance with current “public agency” case law. Thus, Counsel’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. Thus, the Council’s April 29, 2014 Interim Order remains in effect and the Custodian must comply with same.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s April 29, 2014 Interim order that, either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on based on mistake and illegality. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Counsel failed to argue successfully that the MVFD was not a public agency in accordance with current “public agency” case law. Thus, Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, the Council’s April 29, 2014 Interim Order remains in effect and the Custodian must comply with same.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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INTERIM ORDER

April 29, 2014 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2013-196

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because Millstone Valley Fire Department is a member of the Franklin Fire District No. 1 per N.J.S.A. 40A:14-70.1 and thus serves a governmental function under the supervision and control of the Franklin Fire District No. 1, it is a public agency for purposes of OPRA. Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).
2. As the Council has determined that Millstone Valley Fire Department is a public agency for purposes of OPRA, and in the absence of any exemption applying to the responsive records, the Custodian is required to obtain same from Millstone Valley Fire Department and provide access to the Complainant. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006). If the Custodian cannot comply with the Council's Order because individuals at Millstone Valley Fire Department will not disclose same, those individuals are required to identify themselves to the GRC and provide a lawful basis for not providing said records.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2013-196

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail or fax of the Constitution and By-Laws for Millstone Valley Fire Department (“MVFD”) in effect from 2007 through 2013.

Custodian of Record: Tim Szymborski

Request Received by Custodian: February 28, 2013

Response Made by Custodian: March 1, 2013

GRC Complaint Received: July 3, 2013

Background³

Request and Response:

On February 28, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 1, 2013, Dawn Cuddy responded in writing on behalf of the Custodian stating that Franklin Fire District No. 1 (“FFD”) does not maintain a record responsive to the Complainant’s OPRA request. The Complainant responded arguing that a custodian has an obligation to obtain responsive records if they are in a different location and provide same. The Complainant further asserted that it is clear that the FFD took no steps to obtain the records from MVFD, even though the FFD directly supervises them. N.J.S.A. 40A:14-70.1(b).

On March 11, 2013, Ms. Cuddy responded stating that the responsive records are not considered government records under OPRA and the Complainant’s OPRA request is thus denied.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On July 3, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s response arguing that the FFD is a public agency with complete authority over MVFD. The Complainant contended that MVFD, as a subordinate of the FFD, is a public agency and its records are subject to access under OPRA. The Complainant requested that the GRC: (1) determine that the Custodian violated OPRA by failing to disclose the responsive record; (2) order immediate disclosure of the records; (3) determine that the Custodian knowingly and willfully violated OPRA warranting the imposition of a civil penalty; (4) determine that the Complainant is a prevailing party subject to reasonable attorney’s fees; and (5) take any further action deemed by the GRC to be equitable and just.

Statement of Information:

On August 9, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the OPRA request on February 28, 2013 and Ms. Cuddy responded in writing on March 1, 2013, stating that the FFD maintained no responsive records.

The Custodian certified that he performed a search for the records and determined that the FFD did not maintain same. The Custodian certified that although there is no law, regulation, rule or policy requiring that a fire district maintain these records, he went above and beyond his duties by contacting MVFD. The Custodian certified that MVFD denied access to the records. Further, the Custodian certifies that he does not believe that the records have been destroyed.

The Custodian certified that the FFD does not maintain a Constitution or By-Laws for any member departments or fire companies. The Custodian certified that since his first years as a Commissioner from 1986 to 1988 and again since 2006, the FFD never maintained such records. The Custodian further certified that MVPD advised that these records were never provided to the FFD. The Custodian reiterated that he found no legal authority requiring that the FFD maintain these records, and even the Custodian’s Counsel failed to locate a law, regulation, etc. requiring same. The Custodian certified that it is his understanding that although the members are under the control of the FFD’s rules, policies and procedures, each member may adopt their own Constitution and By-Laws. The Custodian thus contended that he lawfully denied access to the responsive records as they are not maintained by the FFD.

Additional Submissions:

On August 19, 2013, the Complainant’s Counsel disputed the Custodian’s SOI. Counsel stated that State statute provides that “[a]ny persons desiring to form a volunteer fire company . . . located within or otherwise servicing the area encompassing a fire district . . . shall first present to the board . . . a written application . . .” N.J.S.A. 40A:14-70.1(a). Further, Counsel stated that “[t]he board of fire commissioners . . . may *by resolution grant the petition and constitute such applicants a volunteer fire company of the district.*” Id. (emphasis added). Counsel further stated that N.J.S.A. 40A:14-70.1(b) provides that the member company “. . . shall be under the supervision and control of the board and in performing fire duty shall be deemed to be exercising

a governmental function.” Counsel noted that N.J.S.A. 40A:14-81.3 provides that a fire district have powers, duties and functions within a district similar to municipalities and that supervision of district personnel is exercised by the commissioners or delegated accordingly by resolution to a single commissioner, employee, or employees thereof. Counsel argued that these statutes necessarily provide that MVFD is subordinate of the FFD and is thus a public agency, a fact confirmed by the Custodian’s reference to MVFD as one of its member fire departments throughout his SOI certification. Counsel further asserted that MVFD’s classification as a public agency is consistent with past court and GRC case law. Times of Trenton v. Lafayette Yard, 183 N.J. 519 (2005); Paff v. NJ Fireman’s Ass’n., 2013 N.J. Super. LEXIS 90 (App. Div. 2013); Sauter v. Twp. of Colts Neck, GRC Complaint No. 2005-07 (March 2006).

Counsel disputed the Custodian’s SOI contention that MVFD’s Constitution and By-Laws are not government records under OPRA. Counsel asserted that the Custodian’s actions are contradictory to his SOI certification that the responsive records are not government records under OPRA. Specifically, Counsel argued that the Custodian first denied access because the records were not in the FFD office, then proceeded to attempt to obtain them from an unknown person or persons at the MVFD before again denying access because the FFD never possessed said records in the past. Counsel contended that the FFD’s practice of not obtaining constitutions and bylaws for all member departments provides a basis for suspicion that this practice is in place to shield such records from public oversight. Counsel contends that without the benefit of access to the Constitution and By-Laws, the public would never be able to determine whether same are in conflict with the FFD’s own policies and procedures.

Counsel further contended that MVFD is statutorily subordinate to the FFD and unquestionably qualifies as a “political subdivision” and/or a “subordinate board.” N.J.S.A. 47:1A-1.1. Counsel asserted that he is confident that the GRC will determine that the MVFD is a public agency under OPRA because 1) the MVFD is substantially, if not entirely, funded by tax payer funds; 2) MVFD cannot act as a volunteer fire company without legislative approval from the FFD; and 3) the MVFD is subject to the FFD’s supervision and control. Counsel argued that for these reasons, the responsive records are government records and the Custodian had an obligation to obtain same. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (Final Decision dated December 8, 2005); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007); Burdick v. Twp. of Franklin (Hunterdon), GRC Complaint No. 2010-99 (Interim Order dated March 27, 2012).

Counsel stated that the Council has previously determined that someone other than a custodian can be found to have knowingly and willfully violated OPRA. Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (August 2009). Counsel requested that the GRC seek a certification from the Custodian as to the exact person(s) that declined to provide MVFD’s Constitution and By-Laws to the Custodian for disclosure. Counsel asserted that it is probable that the individuals that declined to provide the records are the named defendants in Nelson v. Commissioners of the Fire District No. 1 et al., Docket No. SOM-L-232-13. Counsel asserted that these same individuals could have denied access in order to protect various relations and to prevent uncovering potential corruption. Counsel further surmised that because the previous FFD Custodian is/was a member of MVFD, more credence is given to the argument that MVFD deliberately withheld access to the responsive records. Counsel contended that this

matter is ripe for an Office of Administrative Law hearing on whether the Custodian and/or unidentified individuals of MVFD knowingly and willfully violated OPRA under the totality of the circumstances.

Analysis

Public Agency

Although not expressly raised by the parties as the issue here, central to the adjudication of this complaint is whether MVFD is a “public agency” for purposes of OPRA. Accordingly, the GRC must first make a determination of whether the MVFD is a “public agency.” If MVFD is found to be a public agency, the Council will address the Complainant’s asserted denial of access

OPRA defines a public agency as:

Any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

N.J.S.A. 47:1A-1.1.

Most definitions of “public agency” under New Jersey statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public Meetings Act (“OPMA”) contains a definition of a “public body” which requires that an entity, “. . . (1) consist of ‘two or more persons’ and (2) be ‘collectively empowered as a voting body’ (3) ‘to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.’ N.J.S.A. 10:4-8(a).” Lafayette Yard, 368 N.J. Super. 425 (App. Div. 2004).

In Lafayette Yard, the Appellate Division held that Lafayette Yard was both a “public body” subject to the open meetings requirements of OPMA, N.J.S.A. 10:4-1 et seq., and a “public agency” required under OPRA, and ordered disclosure of records to plaintiff. In so doing, the Court noted the definition of a “public agency” in OPRA at N.J.S.A. 47:1A-1.1 and held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the City of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,

- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,
- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the city that designates the city as the “agency” and the corporation as the “redeveloper” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and
- (6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a ‘public body’ under OPMA. The [C]ourt further held that the corporation was “an ‘instrumentality’ created by the City and a ‘public agency’ under . . . OPRA for essentially the same reasons that it is a ‘public body’ under the OPMA.” Id. at 442.

The decision of the Superior Court that Lafayette Yard qualified as a “public body” was affirmed by the New Jersey Supreme Court (Lafayette Yard, 183 N.J. 519 (2005)). *See also Snyder v. American Ass’n of Blood Banks*, 144 N.J. 269 (1996)(finding that the legislature did not create or authorize the American Association of Blood Banks to perform a specific governmental purpose); Williams v. Nat’l Car Rental Sys., Inc., 225 N.J. Super. 164 (1988)(finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corp. v. N.J. Sports and Exposition Auth., 195 N.J. Super. 542 (1984)(citing Wade v. N.J. Turnpike Auth., 132 N.J. Super. 92 (Law Div. 1975), (“The Court noted the official comment to N.J.S.A. 59:1-3: ‘The definition of ‘Public Entity’ provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.’”).

More recently, in Fair Share Hous. Ctr., Inc. v. NJ State League of Municipalities, 207 N.J. 489 (2011), the Supreme Court was tasked with reviewing the Appellate Division’s decision holding that the New Jersey State League of Municipalities (“League”) was not a public agency under OPRA. 413 N.J. Super. 423. The Court acknowledged that although the Appellate Division relied on its previous holding in Lafayette Yard, it erred in “. . . importing into OPRA’s definition of ‘public agency’ the definition of a ‘public body’ found in [OPMA] . . . [t]he language defining a ‘public body’ . . . under OPRA [is] distinctly different.” Id. at 504-505. The Court held that a creation test, as opposed to a governmental function test, controlled in determining whether an entity was a public agency for purposes of OPRA. Specifically, the Court held that:

In Lafayette Yard, we remained faithful to the text of [OPRA] and determined that, in essence, the nonprofit corporation (an ‘instrumentality’) was *created* by a public subdivision therefore making it a ‘public agency.’ *See Id.* at 535-36 . . . The creation test, not the governmental-function test, controlled. Our decision in this case, finding that the [League] is a ‘public agency,’ is wholly consistent with . . . Lafayette Yard.

Id. at 507.

Thereafter, the Council was tasked with determining whether a volunteer fire company was a public agency for purposes of OPRA. In Carrow v. Borough of Newfield (Gloucester), GRC Complaint No. 2012-111 (February 2013), the Council applied the Supreme Court's decision in League and determined that "[b]ecause the Newfield Fire Company was not created by the Borough of Newfield and thus is not an 'instrumentality or agency' of the Borough, the Company is not a public agency subject to the provisions of OPRA . . ." Id. at 10. The Council reasoned that although volunteer fire companies may receive contributions from a contracting municipality and perform a government function, such companies are created solely by the membership and never by a municipality.

However, in Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013), the Appellate Division reversed a Law Division decision holding that the Firemen's Association was not a public agency and remanded the complaint to the trial court for further proceedings. There, the Court provided a comprehensive history of the Association, which was established in 1885 by a group of "incorporated local firemen's relief associations, whose mission was to provide assistance to indigent firefighters and their families." Id. at 279. However, the Association ". . . changed over time, as a result of mandatory statutes, Department of Banking and Insurance regulations, and a judicial decision, Szabo v. NJ State Firemen's Ass'n, 230 N.J. Super. 265 (Ch. Div.1988)." Id. at 280.

The Court first noted that in NJ League, the Supreme Court held that OPRA lacks a "government-function" test, but that "[w]hile proof of governmental function is not necessary to qualify an entity as a public agency, the Court did not preclude the possibility that such proof would be relevant and perhaps sufficient to qualify the entity." Id. at 289. *See* Sussex Commons Ass'n, LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012)(holding that Rutgers Law Clinic did not perform a government function and was not controlled by either Rutgers or any other government agency). The Court thus determined that the Association was a "public agency" under OPRA, reasoning that it ". . . owes its existence to state law, which authorized its creation, granted it powers, including powers over local associations, and barred the creation of a competing state association. N.J.S.A. 43:17-41." Id. at 290. The Court noted that the Association's financial activities bring its public agency status in line with OPRA's aim of providing the public with insight into fiscal affairs to combat waste and corruption. The Court further reasoned that not only did the Association receive tax money as evidenced by N.J.S.A. 54:18-2 and N.J.S.A. 54:18A-2, but that the Association serves numerous government functions.

Complainant's Counsel here contended that the issue of MVFD is clearly a "public agency" for purposes of OPRA based on a plain reading of N.J.S.A. 40A:14-70.1. The Custodian advanced no arguments regarding the "public agency" question.

The GRC first notes that this matter is inapposite to its decision in Carrow, GRC 2012-111, because there was no evidence there that the Newfield Fire Company was part of a fire district. Notwithstanding that MVFD was likely created by the volunteer membership, it is clear that member companies within a fire district exercise a government duty and are under the supervision and control of the district, which is clearly a "public agency." N.J.S.A. 40A:14-70.1. In essence, although the creation of a volunteer fire company is reserved only for the membership, said company organizing within a fire district is expressly required to apply to the

district. As the Court noted in Firemen's Ass'n, the relationship between the Association and its existence are owed to state law, as is the relationship between the creation and function of a volunteer fire company within a fire district. Thus, in applying the Court's decision in Firemen's Ass'n, to the facts of this complaint, the GRC is satisfied that MVFD is a "public agency" for purposes of OPRA.

Therefore, because MVFD is a member of the FFD per N.J.S.A. 40A:14-70.1 and thus serves a governmental function under the supervision and control of the FFD, it is a public agency for purposes of OPRA. Firemen's Ass'n, 230 N.J. Super. at 265.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006), the Council determined that electronic correspondence stored in a government official's personal e-mail account was a government record subject to disclosure when used for Borough business. The Council found that "the location of the records does not inhibit the Custodian from obtaining the records and providing access to the records pursuant to OPRA."

Further, in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) the Appellate Division reviewed the Law Division's ruling, interpreting Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), holding that the defendant did not have to disclose the records responsive to the plaintiff's OPRA request because the records were not in the defendant's possession. The Appellate Division held that the motion judge interpreted Bent, *supra* too broadly. The Appellate Division held:

We find the circumstances in Bent . . . to be far removed from those existing in the present matter because . . . the settlement agreements at issue were made by or on behalf of the [defendants] in the course of its official business. Were we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply . . . relinquish possession to [third] parties, thereby thwarting the policy of transparency that underlies OPRA . . . We reject any narrowing legal position in this matter that would provide grounds for impeding access to such documents.

Id. at 517.

As the Council has determined that MVFD is a public agency for purposes of OPRA, and in the absence of any exemption applying to the responsive records, the Custodian is required to obtain same from MVFD and provide access to the Complainant. Meyers, GRC 2005-127. If the Custodian cannot comply with the Council's Order because individuals at MVFD will not

disclose same, those individuals are required to identify themselves to the GRC and provide a lawful basis for not providing said records.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because Millstone Valley Fire Department is a member of the Franklin Fire District No. 1 per N.J.S.A. 40A:14-70.1 and thus serves a governmental function under the supervision and control of the Franklin Fire District No. 1, it is a public agency for purposes of OPRA. Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013).
2. As the Council has determined that Millstone Valley Fire Department is a public agency for purposes of OPRA, and in the absence of any exemption applying to the responsive records, the Custodian is required to obtain same from Millstone Valley Fire Department and provide access to the Complainant. Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006). If the Custodian cannot comply with the Council's Order because individuals at Millstone Valley Fire Department will not disclose same, those individuals are required to identify themselves to the GRC and provide a lawful basis for not providing said records.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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Senior Counsel

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